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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

No. 473

THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY, PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (P.[1] Pet. App. A–1—A–8) is reported at 269 F. 2d 865. The

[1] "P. Pet. App." refers to the appendix to the petition in No. 459. The opinion is also reproduced in the appendix to the petition in No. 473 (U. Pet. App. 18–25). For simplicity, references to the opinion below will be only to the opinion as reproduced in the appendix in No. 459.

opinions of the Federal Power Commission (R. 481–556, 602–610) are reported at 20 F.P.C. 264 and 571.

JURISDICTION

The judgments of the Court of Appeals were entered on August 4, 1959 (P. Pet. App. A–9; U. Pet. App. 26). Petitions for rehearing, timely filed, were denied on September 9, 1959 (P. Pet. App. A–10; U. Pet. App. 27). The petition in No. 459 was filed on October 9, 1959; in No. 473 on October 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether in light of *Atlantic Refining Co.* v. *New York Public Service Commission,* 360 U.S. 378 (*Catco*), the Court of Appeals erred in failing to hold that, in the circumstances here presented, the Federal Power Commission abused its discretion by issuing to the producer applicants certificates of public convenience and necessity under Section 7(e) of the Natural Gas Act for the sale of natural gas for resale in interstate commerce without rate conditions.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the appendix to No. 459 at pp. B1–B4 and in the appendix to No. 473 at pp. 28–34.

STATEMENT

This proceeding concerns the validity of an order of the Federal Power Commission authorizing sales of

natural gas by independent gas producers to Transcontinental Gas Pipe Line Corporation (Transco) for transmission and resale in interstate commerce.

By applications filed with the Commission, Transco sought authority under Section 7(e) of the Natural Gas Act to expand its transmission facilities at an estimated cost of about $150,000,000 (R. 428–430). This expansion program was undertaken by Transco in order to provide an additional 173,634 Mcf of gas per day needed by its distributing company customers on the Eastern Seaboard to meet the increased demand of new and existing consumers on their systems (P. Pet. App. A–4).

To provide the gas supply for this expansion program, Transco entered into some 38 contracts with 26 producers (P. Pet. App. A–2; R. 483 484). These producers agreed to sell gas to Transco from reserves estimated to contain 2 trillion cubic feet of gas located in different fields scattered through southern Louisiana and the Gulf of Mexico (P. Pet. App. A–5). The contracts, which were for terms of at least 20 years, provided initial prices ranging from 21 to 22 cents per Mcf, exclusive of tax reimbursement (R. 302–303), and 2 cent escalations every four years. The contracts contained no favored nation or price redetermination clauses (P. Pet. App. A–5).

The 38 producer certificate applications were consolidated for hearing before a Commission Examiner in which a number of Transco's customers and other interested parties, including petitioners, intervened

(R. 412–413).[2] The principal issue raised at these hearings was the compatibility with the public convenience and necessity of the proposed producer prices. Petitioners, as well as the Commission's staff, contended that the proposed prices had not been sufficiently supported and that the Commission should issue the certificates only on the condition that the initial price be reduced to either 17 cents or 9.79 cents per Mcf (R. 491).

The Examiner found that although the statutory "reasonableness" of the proposed rates had not been established, "there is no evidence of any kind from which a finding could be made that the ultimate consumers of the gas here involved will be materially adversely affected by reason of the [proposed] price * * *" (R. 419–420). He concluded that the public convenience and necessity required the issuance of certificates without any price condition (R. 423).

Agreeing with the Examiner, the Commission first noted its understanding that (R. 488):

> * * * public convenience and necessity is a "complex" encompassing numerous elements which in diversity and importance vary with the circumstances of particular cases; and in determining whether a certificate should issue, we must weigh the relative importance of the several factors involved, as well as balance the favorable against the unfavorable, if any. * * * [I]t may well be that * * * an aspect of a pro-

[2] The same Examiner conducted separate hearings on Transco's related application (R. 483). The producer and pipeline applications were then consolidated for argument before the Commission, which rendered a single opinion and order (R. 483).

> posal not wholly desirable standing alone should be accepted where offsetting favorable features exist which would in sum total yield a greater public good * * *.

Turning to the price issue, the Commission commented that while price is an "element in determining public convenience and necessity in a producer certificate case," it is only one factor, the importance of which may be materially lessened in relation to other factors in circumstances such as those found to exist in this case (R. 488). In addition, the Commission agreed with the Examiner's finding that there was no evidence in the record to show that the "producer prices proposed are unreasonable" and with his further finding that the proposed prices did not set a new price level "since other pipelines are buying gas in the general area in the same price range." (R. 489). Finally, the Commission noted that there was no evidence showing that the proposed prices will have any material adverse effect upon the ultimate consumers although some price increase to Transco's customers as a result of these producer prices could be anticipated.[3]

Against this potential price increase the Commission balanced the public need for the gas disclosed in the record and concluded in its opinion issued September 4, 1958, that the certificate should be issue without price conditions (R. 490):

[3] The contract prices for these new gas supplies will in themselves increase Transco's average cost of gas in 1960 only 6 mills per Mcf over its 1958 average cost of gas and only 3 mills over what it would be at the 17¢ price for the gas proposed by petitioners.

> * * * The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter. * * * Without this gas, Transco will experience a peak day deficiency next winter [1958–1959] of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere. In our judgment, a consideration of all the factors giving to each its appropriate weight can lead only to the conclusion that public convenience and necessity requires the certification of the producer sales at the initial prices proposed * * *.[4]

Petitioners sought review in the court below which affirmed, one judge dissenting. Expressly testing the Commission's order against this Court's decision in *Catco,* the court stressed that the evidence in the record here demonstrated that there was an urgent public need for gas on the Transco system (P. Pet. App. A–4) and that the producer prices do not establish "a new price plateau in the southern Louisiana shopping area" (P. Pet. App. A–5). Noting further that *Catco* left with the Commission the responsibility for evaluating all the factors bearing on the public interest under Section 7(e) of the Natural Gas Act, the court of appeals concluded

[4] In reaching this conclusion, the Commission specifically did not base it "on any technical consideration of who has the burden of proof or of going forward with the evidence" (R. 492).

that, since all the necessary elements had been weighed in the balance by the Commission, there was no basis for setting the Commission's order aside (P. Pet. App. A–6—A–7).

ARGUMENT

In seeking to have this Court again review the propriety of the Federal Power Commission's issuance to producers of certificates of public convenience and necessity for jurisdictional sales of natural gas without rate conditions, petitioners claim primarily that, in affirming the Commission's grant of certificates here involved, the court below failed properly to apply this Court's decision in the *Catco* case. Petitioners' various contentions in this respect are, however, predicated on a misconception of the *Catco* decision which, properly read, does not preclude the result below. Indeed, inasmuch as the Commission's certificate grants here involved were issued prior to this Court's decision in *Catco,* the court below, the same court which reversed the Commission's grants in *Catco,* took special care, before affirming the present certificate grants, to make certain not only that these authorizations were not barred by *Catco* but also that remand in light of *Catco* was unnecessary.[5]

[5] That the question of remand to the Commission in light of *Catco* was considered by the court below is evidenced by the dissent based on that ground (P. Pet. App. A–7). It is significant, however, that at the same time Judge Hastie, in his dissent, also commented that he was "not now prepared to challenge" the majority's conclusion that "the result reached by the Federal Power Commission in these cases is a permissible result despite the strictures" of the *Catco* decision (P. Pet. App. A–7).

In addition to the result below being in full accord with *Catco,* the present case involves the only Commission order which became final prior to this Court's decision in *Catco* and still is the subject of litigation. Moreover, while it has granted certificates for several new jurisdictional sales of gas to producers since this Court's *Catco* decision, the Commission, in determining whether to accept the prices as proposed or reject them in favor of price conditions, has sought scrupulously to adhere to the teachings of *Catco.* In light of the recency of this Court's *Catco* decision, there is as yet only limited experience against which to test the Commission's balancing of conflicting considerations which comprise the public interest, and hence review of the basic question sought to be raised would seem inappropriate at this time.[6]

1. (a) *Catco* rejected the argument that the Natural Gas Act imposed an obligation upon the Commission to ascertain that the proposed prices for new producers' sales of gas are "just and reasonable" within the meaning of the rate sections of the Act from the outset and held instead that price is but one factor, albeit an important one, of the many which the Commission must balance in determining whether certificates for such producer sales satisfy the standard of the public convenience and necessity and thus may be

[6] Petitioners in No. 473 (at pp. 13–14) seek in addition a ruling by this Court on the scope of the Commission's power to impose rate conditions. No such question is involved in the present posture of this case inasmuch as the form of rate condition, if one is to be imposed, is initially a matter for the Commission and here the Commission has granted the certificates without any price conditions.

authorized under Section 7(e) (360 U.S. at 390–391). Although the Court went on to admonish that there must be "a most careful scrutiny and responsible reaction to initial price proposals of producers" (360 U.S. at 391), this responsibility, the Court indicated, could be discharged by guarding against a price which is "out of line or [whose] approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise" (360 U.S. at 391). Such prices are not to be sanctioned in the absence of evidence demonstrating either the producers' need for such prices or an urgent need by the consuming public for the gas. Since in *Catco*, the Commission had held that the 21.4 cent per Mcf price was clearly out of line and there was no evidence either showing reasons justifying the higher price or an urgent public need for the gas, the Court concluded (360 U.S. at 392):

> * * * [T]here was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates.

(b) The affirmance by the court of appeals of the Commission certificate grants here involved is clearly proper under *Catco*. Unlike the situation presented in *Catco*, the record here contains more than ample evidence demonstrating that the proposed producer prices are in line with the market price in southern Louisiana at the time the Commission issued the present certificate grants. Although these prices are similar to that involved in *Cacto* in the sense that they are at a comparative level (see Pet. in No. 459, p. 12),

about 15 months had elapsed between the Commission's last *Catco* order (June, 1957) and its order in the instant case (September, 1958) and during this period the Commission had authorized other sales in the southern Louisiana area at the same price level. See, *e.g., Southern Natural Gas Co., et al.*, 19 F.P.C. 558, and P. Pet. App. A–6.[7] Since the Commission's orders with regard to those other sales were then final and no longer subject to judicial review, the prices for those sales, quite apart from the *Catco* price, established the new plateau in the southern Louisiana area. As a result, the prices here, while comparable to that in *Catco,* are in line with prevailing prices in that area and hence, unlike the *Catco* price, do not set a new price plateau in the southern Louisiana area.

Moreover, there will not be any unwarranted triggering of general price rises. While under some of Transco's contracts with its producers, the producer will be contractually entitled to a price increase under the contract's "favored nation" clause, these price increases without exception would be subject to the Commission's Section 4(e) suspension and refund powers.[8] Consequently, any amount of the increase

[7] Petitioner in No. 459 at page 16 admits that in addition to the sales contracts cited by the court below there were numerous "other sales not specifically mentioned" at the same price level.

[8] Petitioner in No. 459 states (fn., p. 9), without any citations, that the Commission has permitted some increased rates filed by producers as a result of the triggering of favored nation clauses by the Transco sales to become effective without suspension or any showing as to their justness and reasonableness. As far as we have been able to ascertain from an examination of the Commission's files, petitioner's statement can refer

found unreasonable by the Commission would be subject to refund. In contrast, it is significant that the producer contracts here involved do not contain any favored nation or price redetermination clauses whereby other purchases of gas by Transco would trigger the prices agreed to under these contracts.

In addition, although the proposed producer prices will increase Transco's average cost of purchased gas, the amount of this increase does not reach the proportions suggested by petitioners (Pet. in No. 459, p. 6,

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only to the three increased rates involved in *Hassie Hunt Trust, et al.*, Docket Nos. G-17431, *et al.*, which involved annual rate increases aggregating about $420,000 out of the $5,000,000 total. In those proceedings, increased rate proposals, stemming from triggering by favored nation clauses, initially tendered for filing on November 28, 1958, were rejected and returned by letter from the Secretary of the Commission on December 5, 1958, on the ground that the proposed rates were inappropriate because they included partial reimbursement of the two cent per Mcf Louisiana gas gathering tax which had been suspended by Louisiana. On December 8, 1958, the rejected filings were again submitted to the Commission, accompanied by letters urging that the Secretary's action had been erroneous. The increased rate proposals were accepted for filing on December 10, 1958, and were suspended, by order issued January 9, 1959, until May 28, 1959.

After petitions for court review of the January 9 order had been filed, the Commission, on May 6, 1959 (21 F.P.C. 639), vacated the suspension order because of its view that the rate filings had automatically become effective 30 days after the initial filing on November 28, 1958, and hence the Commission's suspension order was too late to be valid. Thereafter the court review proceeding was dismissed. A petition for review of the May 6, 1959, order is pending in *United Gas Improvement Co.* v. *Federal Power Commission*, C.A. 5, No. 17, 952. The Secretary's administrative error in initially rejecting the filings lends no support to the suggestion in the petition in No. 459 that the Commission will intentionally permit favored nation rate increases to go into effect without suspension or hearing.

fn., and p. 13; Pet. in No. 473, p. 6). Based on Transco's projected deficiency figures for 1960 and its 1958 volumes and costs, the average increase in the cost of purchased gas sustained by Transco as a result of purchasing the instant supply at the contract prices will amount to only approximately 3 mills per Mcf more than would have resulted from the 17-cent-per-Mcf rate proposed by petitioners. (See also *supra*, p. 5, fn. 3).[9]

In any case, this increase in average cost of gas is more than counterbalanced by the need of Transco's customers for this supply of gas. On this matter the evidence in the record here, again unlike the record in *Catco*, is overwhelming and, indeed, is not controverted by petitioners. In fact, the estimated increase of demand from existing customers would produce peak day deficiencies in supply of 116,800 Mcf in 1959, 159,400 Mcf in 1960 and 171,200 Mcf in 1961 (P. Pet. App. A–4). These deficiencies would be

[9] Petitioner in No. 459 seeks to leave the impression that the actual increase in average costs of gas to Transco will be about 3.97 cents per Mcf (Pet. in No. 459, p. 6 and fn.). But even the 2-cent increase contemplated by the so-called *Memphis* letters (see Pet. in No. 473, p. 5, fn.) was not wholly attributable to increased gas costs, but included as well the costs of Transco's proposed project, the capital costs of which alone amount to about $150,000,000. In addition, the 3.97 cent figure represents the entire rate increase filed by Transco in May, 1959 in FPC Docket No. G–18783. This increase, however, is attributable to increases in other costs as well as the increase in the average cost of gas resulting from the certificates issued here. Moreover, about $5,000,000 of the increase was based on triggered increases of other contracts which the Commission may never allow. In this connection it is noteworthy that, on an annual basis, the Commission has allowed only about 60% of the increases in rates filed by the pipelines.

eliminated by the producer sales to Transco involved in this proceeding (P. Pet. App. A-4). Since these reserves had been laboriously assembled through 38 separate contracts with 26 producers in the southern Louisiana area, which is Transco's main buying area (R. 115–116), alternative sources of supply probably could not be assembled to replace the present producer contracts in time to wipe out the anticipated peak day deficiencies. "Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere" (R. 490).[10]

Since the evidence summarized above amply supports the Commission's findings, the court below was fully justified in holding that the Commission had weighed all the necessary elements in the balance as set out in *Catco* and hence that there was no basis under *Catco* for setting the Commission's orders aside.

2. While not seriously disputing that the proposed producer prices are not out of line with those prevail-

[10] The consumer need for gas is highlighted by the statement during the Commission hearings of counsel for Brooklyn Union Gas Company, one of Transco's largest customers (Tr. 2041):

> Because of its urgent need for additional gas, and the improvement which Brooklyn Union understands these proposed producer sales will make in Transcontinental's reserves, Brooklyn Union urges that these proceedings be expedited to the fullest possible extent. Unless Brooklyn Union can obtain additional natural gas to meet the increasing demands of its customers, it believes that any ultimate adverse effect on its rates to consumers will be greater than may eventually result from the prices to be paid these producers for the gas involved in these proceedings.

See also R. 611–613.

ing in southern Louisiana,[11] petitioners nevertheless claim that allowance of these prices is prohibited by *Catco*. These arguments are, however, without merit.

(a) According to petitioners, since the producer prices here involved are comparable to that in *Catco*, this Court's rejection of the *Catco* price, of itself requires the rejection of the prices here (Pet. in No. 459, pp. 12–14). In the same vein, it is urged that acceptance of the producer prices here would, in effect, nullify the remand in *Catco* (Pet. in No. 459, pp. 23–24; Pet. in No. 473, pp. 12–13).

These arguments misconceive the thrust of *Catco*. The *Catco* price was struck down not because that price was held to be *per se* bad and hence prohibited under any and all circumstances, but rather because on the record before the Commission and the courts, the evidence was insufficient to support its allowance—an insufficiency which had led the Commission in its first two *Catco* orders to impose rate conditions upon the certificates. See *supra*, pp. 8–9. Since the Court's remand in *Catco* was predicated solely on the deficiencies of the record, the allowance of the com-

[11] Petitioners in No. 473 do not question the Commission's finding that the proposed prices are not out of line with the prevailing market prices in the southern Louisiana area. Similarly, the New York Commission does not raise any such question as to the prices in all but 4 of the 38 producers contracts here involved. See Pet. in No. 459, pp. 7, 14, fn. Even under these 4 contracts the prices, including tax reimbursement, being paid by Transco are still below the 23.675 cent price, including tax reimbursement, in the producers sales certificated in *Southern Natural Gas Co., et al.*, 19 F.P.C. 558. See Supplemental Brief for Transco in court below in this case at p. 7 and fn. 1.

parable prices here, based as it is on a different and far more adequate record, is not precluded by *Catco*. By the same token, such a result does not nullify the remand in that case.

(b) It is also argued that the prices now prevailing in southern Louisiana cannot be accepted as the current market price because they were propagated as a result of the price allowed by the Commission in *Catco* and hence constitute its illegitimate progeny (Pet. in No. 459, p. 16). Basically, this comes down to a claim that inasmuch as this Court remanded the Commission's orders allowing the price proposed in *Catco*, the prices in the southern Louisiana area must henceforth be rolled back to pre-*Catco* levels.

Apart from the legal and practical problems which would be thus generated (cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374), this argument again is predicated on a misconception of the *Catco* decision. As already pointed out, *supra*, pp. 14–15, the Court in *Catco* did not preclude the Commission from approving the prices there proposed on a proper evidentiary showing, but merely held that the evidence then in the record was insufficient. Since the *Catco* price was thus not of itself fatally defective, there is no reason for not giving full scope and effect to the subsequent sales authorized by the Commission at comparable prices.

Moreover, regardless of how the price in the southern Louisiana marketing area reached its present plateau, it cannot be ignored that with the passage of time following the Commission's decision in *Catco*, the price in the southern Louisiana area has gone up

to the new plateau. Inasmuch as the thrust of *Catco* is to "hold the line" (360 U.S. at 392) and guard against unwarranted leaping of prices "from one plateau to the higher levels of another" (360 U.S. at 391) rather than to roll back presently established prices, *Catco* offers no obstacle to acceptance of the current prices being paid in southern Louisiana as the prevailing market prices.

(c) Finally, it is urged that the prevailing prices cannot be accepted because they have not yet been found reasonable by the Commission (Pet. in No. 473, p. 10). But, in *Catco*, the Court made it clear that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5" (360 U.S. at 390). Recognizing that Commission regulation of the producers was still in a "formative period" and "the ground rules * * * are [still] being evolved" (360 U.S. at 391), the Court ruled that, at least during this period, the Act's purpose of consumer protection would be amply satisfied by keeping prices from increasing without warrant above those prevailing in the market at the time. "Section 7 procedures in such situations thus act to hold the line," so that the consuming public may be protected until a just and reasonable rate is determined under other sections of the Act (360 U.S. at 392).

3. Equally without substance are petitioners' attacks on the Commission's findings that there was an urgent public need for this gas.

(a) It is claimed that need for the gas was by Transco, not its customers, and that the asserted

need constitutes "nothing more than [Transco's] ability to market successfully more gas than it then had available to sell" (Pet. in No. 459, p. 21). This claim distorts the true situation. Generally, the desire for gas since World War II has emanated from the consuming public, which despite almost explosive expansion in pipeline facilities since 1946 to meet these demands, still shows no signs of saturation. See Brief for the Federal Power Commission in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, Nos. 23, 25, and 26, Oct. Term, 1958, at pp. 64–71. That it is this kind of demand, *i.e.*, demand by the consuming public for more gas, which is present in this case is evidenced not only by the testimony of Transco's customers (See P. Pet. App. A–4—A–5) but also by the so-called Memphis letters in which all of Transco's customers agreed to a 2-cent rate increase, subject to their right to oppose on grounds of reasonableness, in order to enable Transco to seek certification of its expansion program (see Pet. in No. 473, p. 5, fn., p. 7, fn.). It is also manifest from the fact that only two of Transco's 27 customers protested the producer prices in the proceedings below. See also *supra*, pp. 12–13 and fn. 10. Even these two customers admittedly intervened in the proceedings on the Transco expansion program in order to make sure that they were allocated a share of the increased volumes of gas proposed to be made available (see Pet. in No. 473, p. 4), and both have been careful to make it clear that their opposition is confined to the producer

prices and does not embrace the expansion program of Transco for which this very gas is a *sine qua non*.

(b) Also it is argued that the need for additional gas cannot justify the allowance of the prices here proposed (Pet. in No. 473, p. 9). This contention flies in the face of the *Catco* decision, which plainly indicates that the need for the gas is one of the factors which the Commission may consider in determining whether the producer prices are in the public interest. Any doubt on this score is dissipated by Mr. Justice Harlan's statement in his concurring opinion (360 U.S. at 394):

> * * * There is no evidence supporting what appear to be the crucial findings that (1) "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas," particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves * * *.

4. For these reasons the result below is, we believe, consistent with the principles applied by this Court in *Catco* and by the Commission and the courts in pre-*Catco* cases. See, e.g., *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, 257 F. 2d 634 (C.A. D.C.), certiorari granted, 358 U.S. 877, certiorari dismissed pursuant to Rule 60, 358 U.S. 948. The *Catco* case was *sui generis* because (1) the Commission had originally found that there was insufficient evidence to show that the sales at the proposed price were required by the public convenience and necessity—a finding never reversed or vacated—and (2)

there was nothing in the record to support the Commission's finding of the need for the gas which it had regarded as overriding price considerations. As we have shown, neither of the *Catco* infirmities is present here. Moreover, the Commission's decisions since *Catco* show that it is conscientiously continuing to apply the principles of this Court's decision in *Catco*.

Thus, since *Catco*, the Commission has twice conditioned the grant of certificates on the acceptance of lower initial prices by the producers. In *Transwestern Pipeline Co. et al.*, Docket Nos. G–14871, *et al.*, Opinion No. 328, August 10, 1959, the Commission found that the proposed initial prices exceeded the prices of comparable sales in the same area by from one to six cents and that certification of these high price contracts would result in an annual increase of $17,860,000 in the price to be paid by consumers in California. Expressly taking note of *Catco*, the Commission held that the public convenience and necessity required it to "hold the line" on further increases in the level of prices paid for natural gas and, accordingly, imposed price conditions reducing the producers' initial prices to the level of the existing prices in the fields involved.[12] All except one of the producers have accepted certificates so conditioned.

Similarly, in *Phillips Petroleum Co., et al.*, Docket Nos. G–15514 *et al.*, Opinion No. 330, October 13, 1959, the Commission, in granting the certificates for the producer sales there involved, required that the

[12] On September 23, 1959, the Commission granted the producers permission to present additional evidence to justify the initial contract prices.

proposed initial prices be reduced by two cents per Mcf, one cent above the previous high price in the area. The one cent increase was allowed principally because of higher development costs of the new field from which the sales are to be made. In reaching this conclusion, the Commission stated that "the risk of failing to substantiate the proposed price rests on [the certificate] applicants (Mimeo Op. p. 4).

While, as petitioners note (Pet. in No. 459, p. 26; Pet. in No. 473, p. 12), the Commission has also certificated producer sales without price conditions, the Commission has done so only because it was convinced that *Catco* did not require the imposition of price conditions in the situations there presented. Thus, in *South Georgia Natural Gas Co., et al.*, Docket Nos. G–9892, *et al.*, Opinion No. 325, August 7, 1959, the Commission, in its first post-*Catco* opinion, explained that, as it read *Catco*, "the producers' proposed initial price must be supported by substantial evidence establishing that the price is * * * in the public interest" and "that although the Commission should consider all the factors * * *, price is an element of prime importance [which] the Commission must scrutinize closely with a view to protecting the consumer and holding the line against price rises." (Mimeo Op. pp. 8–9). In applying this reading, the Commission found that the proposed prices were not out of line with other prices paid by the purchaser or other pipelines in the same general area, and that they would not trigger any general price rises. Moreover, the Commission noted that the purchase of gas at the proposed prices would increase the purchasing pipeline's aver-

age cost of purchased gas for 1961 by only .05 cent per Mcf. The impact of such an increase, the Commission concluded, was outweighed by the benefits of the proposed sales and the demonstrated need for the additional gas by the purchasing company's customers.

The Commission also certificated producer sales from southern Louisiana gas fields to Hope Natural Gas Company at the proposed base prices of 21 and 21.5 cents per Mcf in *Texas Gas Transmission Corp., et al.*, Docket Nos. G–17335, *et al.*, Opinion No. 327, August 10, 1959, rehearing denied, October 7, 1959. In that case, the record showed that the proposed prices would not result in any immediate increase in Hope's resale prices, that these prices would not set new plateaus either in offshore or onshore fields, and that the proposed producer prices would not trigger "favored nation" clauses, either to Hope or to other purchasers. By these showings coupled with Hope's demonstrated need for the gas, the Commission held, the producers sustained their burden of proving that the proposed prices were required by public convenience and necessity. In rejecting the contention of the New York Public Service Commission, petitioner in No. 459, that the sales should be conditioned on a price of 18 cents per Mcf, including tax, because that was the pre-*Catco* price level in southern Louisiana, the Commission, in addition to pointing out that the proposed prices were not out of line with the prevailing prices in these fields, firmly announced that it would consider "any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from

the applicant that the public convenience and necessity requires certificates at that price" (Mimeo. Op. 13).[13]

Since *Catco* did not strike down the prices there involved as invalid *per se*, it would seem inappropriate for this Court to consider whether the Commission is adhering to *Catco* in a pre-*Catco* decision of the Commission. Moreover, in its post-*Catco* orders the Commission has been adhering closely to the *Catco* teachings and in accordance therewith is holding the line against further unwarranted increases in producer prices. In these circumstances, petitioners' attempt to relitigate the *Catco* issues and to ask this Court again to hold, in effect, that initial price must be justified by cost evidence (Pet. in No. 473, pp. 10–11) is premature at best.

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[13] Comparable considerations were relied on in certificating producers sales in the southern Louisiana area at prices of 21.4 and 21.5 cents per Mcf exclusive of tax reimbursement, in *Superior Oil Co., et al.*, Docket Nos. G-16580, *et al.*, August 10, 1959, rehearing denied, October 7, 1959; *Sunray Mid-Continent Oil Co.*, Docket No. G-14753, August 10, 1959, rehearing denied, October 6, 1959; *California Co., et al.*, Docket Nos. G-16108, *et al.*, August 10, 1959, rehearing denied, October 7, 1959; *Sun Oil Co., et al.*, Docket Nos. G-15122, *et al.*, August 10, 1959, rehearing denied, October 7, 1959.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that these petitions for writs of certiorari should be denied.

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I have authorized the filing of this brief.

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